Remittitur and Judgment of the New York Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, *ss.*:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 6th day of January in the year of our Lord one thousand nine hundred and seventy-two, before the Judges of said Court.

WITNESS,

THE HON. STANLEY H. FULD,
Chief Judge, Presiding.

RAYMOND J. CANNON, *Clerk.*

Remittitur January 6, 1972.

1. No. 422 71

MICHAEL FHAGEN *& ano.*,
Appellants,

—VS.—

ALAN D. MILLER, M.D., individually and as Commissioner of Mental Hygiene of the State of New York, *& ano., &c.*,
Respondents.

BE IT REMEMBERED, That on the 17th day of September in the year of our Lord one thousand nine hundred and seventy-one, Michael Fhagen & ano., the appellants in this

cause, came here unto the Court of Appeals, by Bruce J. Ennis, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Alan D. Miller, M.D., individually and as Commissioner of Mental Hygiene of the State of New York, & ano., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General, & ano., their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Bruce J. Ennis, of counsel for the appellants, and by Brenda Soloff, of counsel for the respondent Miller, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and pro-

vided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,
Albany, January 6, 1972.

(SEAL)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

**Opinion of the Supreme Court—
New York County**

SUPREME COURT

SPECIAL TERM

NEW YORK COUNTY—PART I

MICHAEL FHAGEN and MIRIAM WINTERS,

Plaintiffs,

—v.—

ALAN D. MILLER, M.D., individually and as Commissioner of Mental Hygiene of the State of New York, and ALEXANDER THOMAS, M.D., individually and as Director of the Psychiatric Division, Bellevue Hospital Center,

Defendants.

Dec. 9, 1970.

FRANCIS J. BLOUSTEIN, Justice.

Pursuant to CPLR 3001, plaintiffs challenge the constitutionality of a number of sections of the New York Mental Hygiene Law, principally Sections 72 and 78, plus Section 62.2 of Title 14 of the Official Compilation of Codes, Rules and Regulations of the State of New York, and request declaratory, injunctive and other relief. Upon this proceeding, by motion and cross motion, each of the parties seeks summary judgment.

In July 1969, plaintiff Fhagen brought a federal action (S.D.N.Y.) against defendants Miller and Thomas, raising essentially the same constitutional objections to the Mental Hygiene Law, as herein raised. On December 4, 1969, the Hon. Edward Weinfeld ruled that plaintiff Fhagen's complaint raised substantial constitutional questions and ordered the convening of a three-judge court to hear and determine the merits of the action (Fhagen v. Miller, 306 F.Supp. 634, S.D.N.Y. 1969). Thereafter, plaintiff Winters moved to intervene as a plaintiff in the pending action. On April 20, 1970, the three-judge federal court (Kaufman, C. J., Weinfeld, D. J. and Palmieri, D. J.) determined to retain jurisdiction but to withhold consideration of the constitutional issues presented until the New York State courts had an opportunity to construe the scope and meaning of the challenged provisions of the Mental Hygiene Law (Fhagen v. Miller, 312 F.Supp. 323, S.D.N.Y.). On June 22, 1970 the present proceeding was commenced and issue was fully joined on July 24, 1970.

Plaintiffs' principal attack is directed to Section 78 of the Mental Hygiene Law which deals with emergency involuntary admissions to hospitals of alleged mentally ill persons upon the application of a lay person. Section 78(1) provides that state approved hospitals may receive or retain for thirty (30) days any person "alleged to be in need of immediate observation, care or treatment for mental illness". It further provides that if, at any time after admission, the patient or anyone on his behalf gives written notice of the patient's desire for release, or if the hospital director determines that additional care and treatment beyond the thirty-day period is necessary and the patient does not consent thereto, an application for a judicial hear-

ing accompanied by the certificate of two examining physicians must be made pursuant to Section 72. The application must be filed within ten days after the giving of the notice or before the expiration of the thirty-day period.

Section 78(2) provides that once the application is filed, the admission and retention of the patient "shall be subject to all of the provisions for notice, hearing, review and judicial approval of retention or transfer and continued retention, as provided in Sections [72, 73 and 74] * * *".

Section 78(3) authorizes any peace officer to take into custody any person "who appears to be mentally ill and is conducting himself in a manner which in a sane person would be disorderly" and to remove him to any state approved hospital for immediate observation, care or treatment.

Section 78(4) provides for the apprehension and hospitalization of alleged mentally ill persons pursuant to judicial warrant, which entails, of course, the appearance of the person before a magistrate prior to hospitalization.

Section 72 establishes the so-called "two physician" or "medical admission" procedure for involuntary commitment. A person may be received or retained in a hospital if alleged to be "mentally ill and suitable for care and treatment" upon the certificate of two examining physicians accompanied by an application for admission executed within ten days prior to such admission by one of various classes of individuals, including the patient's nearest relative, a friend, a public welfare officer, community service officer, or a director of a community mental health service. The patient must be examined "forthwith" at the receiving hospital by a staff physician and "if such person is found

to be in need of care and treatment", he may be admitted. Within five days after admission, the patient must be given written notice of the application and of his right to demand a judicial hearing on the question of the need for further hospitalization. Written notice must also be given to the patient's nearest relative other than the one who signed the application, or to three additional persons designated by the patient in writing, and to the Mental Health Information Service. If the patient, or anyone on his behalf, requests in writing a hearing at any time prior to sixty days after admission a hearing must be scheduled by a court not later than five days from the receipt of that request. The court may then hear testimony and examine the patient. If the court determines the patient to be mentally ill, it may order him retained for treatment for a period not to exceed six months.

Section 74, referred to above, provides for judicial review of commitment orders, with the right of trial by jury. Thereafter, the patient may pursue normal appellate remedies.

The plaintiff Fhagen was twice committed to Bellevue Hospital pursuant to Section 78 of the Mental Hygiene Law, and his further confinement beyond thirty days was effected by invoking the "two physician" procedure of Section 72 of the Mental Hygiene Law. Fhagen was also involuntarily confined for periods of three and six months in 1962 and 1963 under other commitment procedures. Fhagen's last commitment, under Section 78(1), occurred on April 28, 1969. On May 7, 1969, the basis for his commitment was changed from Section 78 to Section 72(1), the two physicians' certificates and accompanying application being executed while he was confined and receiving treat-

ment under Section 78(1). On May 21, 1969 habeas corpus and Section 72 review proceedings were instituted, challenging the constitutionality of his confinement under Sections 78 and 72. The proceedings were twice adjourned, over plaintiff's objection, and, in the interim, he was discharged from Bellevue, on June 12, 1969. On June 17, 1969 both the Section 72 review petition and the habeas corpus petition were withdrawn.

Plaintiff Fhagen alleges that notwithstanding the fact that he is presently at liberty, he is under "constant apprehension" of renewed commitment under Sections 78 or 72. This same allegation was made in the Federal court action and was held to form a sufficient basis for standing to sue. ("* * * plaintiff does present here a justiciable controversy and a proper formal claim for equitable relief." Fhagen v. Miller, 306 F.Supp. 634, 637).

Plaintiff Winters also bases her standing upon a "constant apprehension" of renewed commitment. She, however, presents a history of only one prior commitment, pursuant to Section 78, in 1968. She was admitted involuntarily to Bellevue Hospital on May 2, 1968, after being forcibly removed from her hotel room by police officers, acting at the request of the hotel management. On May 7, 1968, the basis for her commitment was changed from Section 78(1) to Section 72(1), the physicians' certificates and accompanying affidavit having been executed during her emergency confinement under Section 78. On May 13, 1968, plaintiff Winters was discharged from Bellevue and immediately transferred to Central Islip State Hospital. She alleges that she was there advised that unless she agreed to remain as a voluntary patient she would be held involuntarily for a minimum of six

months. She so agreed and her status was converted to "voluntary" on June 18, 1968. She was discharged one month later and remains at liberty. She asserts that at no time during her confinement was she ever advised of her right to request judicial review of the necessity for her hospitalization.

In the instant action, defendants have not renewed their objection to plaintiffs' standing, save with respect to Section 72. While this court tends to view the claim of "constant apprehension" of re-commitment as a most tenuous basis for any standing to sue herein, the court will not, sua sponte, raise the question of standing in view of the Federal Court's determination and defendants' evident desire to try the case on the merits. With respect to Section 72, however, defendants' standing objection has merit and is sustained. Neither plaintiff has ever been initially admitted pursuant to Section 72 and presents no reasonable basis for claiming "apprehension" that they will suffer such fate. Even though plaintiffs will not be heard to challenge Section 72, per se, it is evident that their challenge to Section 78 necessarily involves a consideration of Section 72 procedures to the extent that these are incorporated in, and employed under, Section 78 procedures.

Subsequent to the institution of the aforementioned Federal Court action, but prior to the decision of the three-judge court (retaining jurisdiction pending the outcome of state court litigation), the State Commissioner of Mental Hygiene promulgated certain regulations with respect to Section 78 to provide additional safeguards for prospective patients (see Title 14, Official Compilation of Codes, Rules and Regulations of the State of New York, § 62.2). The new regulation provides that no patient is to

be retained under Section 78 for more than fifteen days; that a person brought to an approved hospital for admission pursuant to Section 78 shall be "forthwith examined by a staff physician" after which "the patient may be admitted" if found to be in need of immediate observation, care and treatment; that the Mental Health Information Service is to be notified promptly of the admission; that the patient is to be notified promptly (i.e., within 24 hours of admission to a ward) in writing (1) that he has a right to demand his release at any time, and, if not released, the right to receive a judicial hearing at his request on the question of need for hospitalization, (2) that the Mental Health Information Service has been notified of his admission and is available to him, (3) that he may, at any time, on his own request or anyone on his behalf, communicate with the Mental Health Information Service and avail himself of its facilities, and (4) that he may communicate once by telephone or the "next most expeditious method" with any person in the State. If the hospital director is unwilling to release the patient upon demand, such demand shall be treated as a request for a habeas corpus proceeding pursuant to section 426 of the Mental Hygiene Law and the director shall "forthwith" notify the appropriate court and the Mental Health Information Service of this habeas corpus hearing demand. This hearing in no way abrogates the obligation of the hospital to proceed with the filing of a two-physician certificate as required by Section 78(2). If it is determined that the patient requires further hospitalization, this "two physician" procedure must be effected within the shortened period of fifteen days.

Plaintiffs concede that the new regulation appears to eliminate a number of objections originally raised with

respect to the operation of Section 78, but they question whether it is within the power of the Commissioner of Mental Hygiene to promulgate such regulation, which alters the statutory scheme of MHL § 78(1) and (2). While the challenged regulation modifies somewhat the procedures obtaining under Section 78, it does not appear to be fatally inconsistent with the statute, and the court finds that the regulation is a legitimate exercise of the Commissioner's statutory authority and is, therefore, valid. (See, MHL §§ 7(5), 9(3), 11 and 12.)

Plaintiffs argue, in any event, that the new regulation does not resolve all constitutional problems raised by the statute, and contend that the statute can only be constitutionally preserved if judicially construed in the manner recited in their complaint. This court does find that the statute requires clarifying judicial construction in certain areas, but not necessarily the construction urged by plaintiffs.

One critical deficiency in the statute is the absence of clear admission standards for emergency involuntary admissions. As noted, Section 78(1) (as modified by Section 62.2) authorizes the admission of an individual if it is medically determined that he is "* * * in need of immediate observation, care or treatment for mental illness." (This is to be contrasted with the standard for non-emergency involuntary admissions under Section 72, requiring the written opinion of two examining physicians that the prospective patient is "* * * mentally ill and suitable for care and treatment.") The term "mental illness" is substantially defined under MHL § 2(8), which defines a "mentally ill person" as, a "person afflicted with mental disease to such an extent that for his own welfare or the welfare of others, or of the community he requires

care and treatment." Nowhere in the statute, however, is found any express formulation of the standard for determining that a mentally ill person is in need of "*immediate* observation, care and treatment." Plaintiffs argue that Section 78, which authorizes temporary confinement of an individual without prior notice or hearing, must be held to contravene the requirements of due process unless the sole standard for determining "immediacy" of care be that the patient constitute an immediate physical threat to himself or society. They argue that the prospective patient must be found to be "dangerous," as that term is understood at common law, i.e., keyed to physical violence. More pointedly, plaintiffs urge a rule that no person shall be considered imminently dangerous to himself or others unless there is reasonable grounds to believe that, if not immediately restrained, he would probably commit suicide or inflict substantial physical injury on other persons.

It is clear from an analysis of the Mental Hygiene Law that the Legislature never intended such a limited rigid standard for determining the need for emergency involuntary admissions. Thus, subd. 3 of Section 78 authorizes the apprehension and transmission to an approved mental hospital of any person "who appears to be mentally ill and is conducting himself in a manner which in a sane person would be disorderly." The category of "dangerously mentally ill" is recognized to be a class distinct from the general class of mentally ill persons and special provisions relating to this class have been provided by the Legislature. MHL § 85 defines the "dangerously mentally ill" patient as one "who has committed or is liable to commit an act or acts which if committed by a sane person would constitute homicide or felonious assault" or whose presence in a

regular mental hospital is "dangerous to the safety of other patients therein, the officers or employees thereof, or to the community * * *." This section prescribes the procedure, medical and judicial, for removing such patients to a maximum security facility (Matteawan State Hospital). MHL § 74 affords to "any person aggrieved," the right—not otherwise available—to challenge a decision to release a mentally ill person, in those cases where said person is "proved to be dangerous to himself and others" (see also, MHL § 76, limiting the authorization for involuntary admissions solely on the certificate of certain community mental health officials to cases where the prospective patient is deemed to be "dangerous to himself and others").

It has been definitively held that due process is not offended by a temporary confinement, without prior notice or hearing, where immediate action is necessary for the protection of society and for the welfare of the allegedly mentally ill person (Matter of Coates, 9 N.Y.2d 242, 213 N.Y.S.2d 74, 173 N.E.2d 794, app.dism. 368 U.S. 34, 82 S. Ct. 147, 7 L.Ed.2d 91; Matter of James, 22 N.Y.2d 545, 552-553, 293 N.Y.S.2d 531, 240 N.E.2d 29). "The protection of society" would appear to encompass more than prevention of murder and mayhem, and would reasonably include the traditionally recognized function of government to preserve public order, public health and public sensibilities. Thus, for example, if the allegedly mentally ill person is engaging in conduct which, if committed by a sane person, would constitute disorderly conduct, criminal nuisance, public lewdness, or sexual abuse of a minor, the State's legitimate interest in protecting society would warrant that person's temporary confinement as surely as if the individual was engaging in conduct amounting to felonious assault or homicide. Accordingly, the court deems it unwise

and unnecessary to limit the basis for emergency involuntary admission under MHL § 78 to "dangerous" conduct. An adequate workable standard is that suggested in Matter of Coates, supra, namely that such admission procedure is authorized where it is found that immediate action is necessary for the protection of society and the welfare of the allegedly mentally ill person.

Plaintiffs' challenge to the standard for admission under Section 72 is also rejected, as the same applies in a conversion of status proceeding under Section 78(2). Under the new procedures directed by Regulation 62.2, a patient admitted as an emergency case is not converted to Section 72 status until a judicial hearing is held on the question of the need for retention and further treatment, with the burden of proof thereat being upon the hospital director. Given the protection of a prior judicial hearing, a mentally ill person who requires care and treatment for his own welfare, and that of the community, but will not seek it, may be required to yield to the State's interest as parens patriae and involuntarily undergo the treatment necessary to restore him to mental health.

Plaintiffs' second principal objection to Section 78 is that it does not adequately provide for a hearing on the question of the necessity for, and propriety of, the emergency admission. Although Section 78(2) provides that upon application for conversion to Section 72 status, "the admission and retention of any such patient shall be subject to all of the provisions for notice, hearing, review and judicial approval of retention", it is not seriously questioned that the hearing on conversion to Section 72 status, concerns itself principally with the patient's need for continued treatment, not with the justification for employment of emergency admission procedures. Moreover, it has been ade-

quately demonstrated that the time frame within which the conversion hearing may be held often precludes a seasonable, meaningful review of the emergency question, per se. However, Section 426 of the Mental Hygiene Law does afford the patient a means for seasonably testing his emergency admission by way of "habeas corpus" proceeding. The federal court opined that, because of plaintiff Fhagen's experience (i.e., adjournment of the habeas corpus hearing over the objection of his counsel), this may be an "illusory remedy" (see Fhagen v. Miller, supra, 306 F.Supp. p. 637, ftn. 5). This court does not share that opinion. The remedy is real and its possible misapplication in one instance is no basis for finding it constitutionally insufficient. It will be noted, moreover, that an adjournment was granted on Fhagen's case because his application presented not merely a challenge to the legal and medical validity of his individual involuntary admission, but a full-blown challenge to the constitutionality of the law. Indeed, this challenge was found by the Federal Court to be so substantial as to warrant the convocation of a three-judge federal bench. The application was an exceptional one and the resulting adjournment to enable defendants to marshal a defense of the entire statutory scheme was at least understandable. In any event, the Commissioner's new regulation (Section 62.2) treats any request for release, after emergency, involuntary admission as an automatic habeas corpus application and mandates that the hospital director proceed "forthwith" to perfect such application for judicial review. As a consequence, this review remedy is now anything but illusory.

Defendants acknowledge that the scope of inquiry upon the habeas corpus proceeding includes the patient's mental

condition as of the date of his admission and consideration of the need for, and propriety of, the use of emergency admission procedures. Of course, the new regulation makes it clear that the right to a habeas corpus hearing is "in addition to" the right to a hearing under Section 78(2), which latter will continue to concern itself principally with the need for continued confinement for care and treatment.

Defendants agree with plaintiffs' contention that the burden of proof at said hearings is on the director of the hospital with custody of the patient, to establish that the patient met and meets the statutory standards for involuntary admission and retention. However, defendants oppose plaintiffs' contention that the standard of proof upon said hearing be that imposed by the criminal law, i.e., proof beyond a reasonable doubt. The authorities cited by plaintiffs for the contention are not persuasive. The challenged statutory provisions are part of a sweeping change made in this State's Mental Hygiene Law after extensive investigation and exhaustive study and research by the members of the legal and medical professions and other public groups. As the three-judge Federal bench observed, "The new law, the product of these studies, sought to achieve a balanced approach to the interests of the individual and the community in the administration, treatment and hospitalization of the mentally ill; it also was keyed to due process requirements and designed to provide a more meaningful judicial review than was available under the prior law." (Fhagen v. Miller, supra.) One of the more enlightened objectives was to insure the individual his due process of law while removing the aura (and stigma) of criminality obtaining in commitment proceedings under former law. (Cf. Robinson v. California, 370 U.S. 660, 666, 82 S.Ct. 1417, 8 L.Ed.2d 758.) The object of hospitalization is different from the

object of incarceration as the result of crime and the standard should be no more than the civil standard to determine the need for hospitalization so that treatment can properly begin (see, People v. Fuller, 24 N.Y.2d 292, 304, 300 N.Y.S.2d 102, 248 N.Ed.2d 17; Matter of James, supra). Plaintiffs' citation of In re Gault (387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527) is particularly inappropriate in this regard. Even where the precipitating cause for apprehension and *temporary* confinement is conduct which, if committed by a sane man, would be deemed criminal, the Mental Hygiene Law (as modified by the regulation 62.2) affords the individual a full panoply of due process protections denied to Master Gault. Moreover, it is not, nor can it be, claimed that the title "hospital", given to our regular mental institutions, is a mere euphemism for penal or correctional institutions.

Plaintiffs next urge the court to construe the "disorderly conduct" standard of Section 78(3) to have a meaning coextensive with that given to the same term in Section 240.20 of the Penal Law. (Both plaintiffs were delivered to institutions by peace officers, pursuant to this subdivision.) Since this provision is addressed to peace officers, it is reasonable to conclude that the phrase "disorderly conduct" was intended to have the same meaning given it by Penal Law Section 240.20. (That does not mean, however, that justification for admission pursuant to Section 78 [3] is dependent upon proof beyond a reasonable doubt of guilt of the violation of disorderly conduct.)

Plaintiffs also advance the contention that the statute should be read so as to require defendants to explore the possibilities of employing less drastic alternatives to full-time hospitalization, and that full-time hospitalization should be prohibited if less drastic alternatives would

suffice. Defendants assert that, within the limits of available time, personnel and facilities, they and the Mental Health Information Service, do attempt to explore the possibilities of alternative care (plaintiff Fhagen himself was released from confinement to receive outpatient treatment, although he, rather than the hospital, initiated that action); but facilities are not always equal to the need. At any rate, plaintiffs' contention as to alternative courses of treatment, however meritorious it may be, does not state a constitutional claim (cf. Lake v. Cameron, 124 U.S.App. D.C. 264, 364 F.2d 657).

Finally, plaintiffs contend that Sections 70(6), 78 and Regulation 62.2 are violative of the First, Fourth, Fifth, Sixth and Fourteenth Amendments insofar as they unreasonably limit a patient's outside communications. The statute provides (e.g., § 70 [6]) that upon admission each patient,

> "shall be given the opportunity to communicate once by telephone, or if not possible, by the next most expeditious method, with any person within the state."

However, Section 15 of the Mental Hygiene Law mandates that all patients,

> "shall be allowed to correspond without restriction with any public official and with the mental health information service."

Defendants contend that there are sound medical reasons for limiting patients' communications to "any person" of the patients' choosing. Whatever the merits of this medical judgment in each individual case, the limitation does not appear, on its face, to be constitutionally improper in view

of protection afforded patients by Section 15 of the Mental Hygiene Law.

Both sides present statistical evidence and expert opinions on the efficacy of existing and proposed alternative statutory schemes. While interesting and illuminating, this conflicting evidence is somewhat beside the point and does not raise any factual issues which preclude summary disposition of the matter. Both sides also factually contest the need for, and appropriateness of, plaintiffs' prior commitments. However, in view of the basis for standing herein (i.e., plaintiffs' fear of prospective application of the law), their individual prior experiences are of little relevance to the legal questions presented. It is to be noted that each side, by moving for summary judgment, concedes that there are no factual issues which preclude summary relief. The court concurs in this concession.

Accordingly, based upon all of the foregoing, the plaintiffs' motion for summary judgment is denied and defendants' cross motion is granted.

**Opinion of the Appellate Division—
First Department**

SUPREME COURT

APPELLATE DIVISION—FIRST DEPARTMENT

MICHAEL FHAGEN and MIRIAM WINTERS,

Plaintiffs-Appellants,

—v.—

ALAN D. MILLER, M.D., Individually and as Commissioner of Mental Hygiene of the State of New York, and ALEXANDER THOMAS, M.D., Individually and as Director of the Psychiatric Division, Bellevue Hospital Center,

Defendants-Respondents.

May 13, 1971.

Before:

CAPOZZOLI, *J.P.*, and
NUNEZ, KUPFERMAN, STEUER and EAGER, *JJ.*

PER CURIAM.

Judgment, Supreme Court, New York County (Bloustein, J.), entered January 28, 1971, unanimously modified, on the law, to the extent of striking therefrom that part of the last decretal paragraph which dismisses the complaint, and substituting therefor a provision declaring that the emergency and medical admission sections of the Mental Hygiene Law (§ 78[1] and § 72[1] are constitutional and valid and, as so modified, affirmed, without costs and without disbursements. Since this was an action for declaratory

judgment, it was error, in granting summary judgment to defendants, to direct dismissal of the complaint, and a declaration as to the constitutionality of the sections attacked should have been made. (See *Lanza* v. *Wagner,* 11 N.Y.2d 317, 334, 229 N.Y.S.2d 380, 393, 183 N.E.2d 670, 679; *New York Sporting Arms Association, Inc.* v. *City of New York,* 31 A.D.2d 793, 297 N.Y.S.2d 287 and cases cited therein.)

Opinion of the New York Court of Appeals

COURT OF APPEALS OF NEW YORK

Jan. 6, 1972.

MICHAEL FHAGEN *et al.*,

Appellants,

—v.—

ALAN D. MILLER, M.D., Individually and as Commissioner of Mental Hygiene of the State of New York, *et al.*,

Respondents.

FULD, *Chief Judge.*

We are called upon to consider the constitutionality of sections 72 and 78 of the Mental Hygiene Law, Consol. Laws, c. 27, which provide for involuntary admission of certain types of mental patients.[1]

The plaintiffs, former mental patients in New York State and New York City hospitals, asserting that they are in "constant apprehension" of being committed under sections 72 and 78 seek a judgment declaring those provisions unconstitutional. In brief, it is their position that, in authorizing involuntary hospitalization without prior notice

[1] Section 78 authorizes the director of an approved hospital to accept temporarily any person assertedly in need of *immediate care* by reason of mental illness. Section 72 deals with a person who is alleged *simply to be mentally ill*, in such a case, the certificate of two physicians is required in support of an application made on the patient's behalf by a third party (see, *infra*, p. 395).

or judicial hearing, the challenged sections deprive them, as well as all others alleged to be mentally ill, of their liberty without due process of law.

The sections in question were part of an extensive change in the Mental Hygiene Law made upon the recommendation of a special committee to study procedures for the commitment of the mentally ill. (See Special Committee to Study Commitment Procedures of Association of the Bar of the City of N. Y., Mental Illness and Due Process—Report and Recommendations on Admission to Mental Hospitals under New York Law [1962].) Section 78 provides for the involuntary admission to an approved hospital, for no longer than 30 days, of any person who is "alleged to be in need of immediate observation, care or treatment for mental illness" (subd. 1).[2] Any interested party may arrange for his hospitalization; no doctor's certificate is required. However, if the patient or someone on his behalf gives notice in writing of his desire to be released, and it is determined that he requires care and treatment in a hospital beyond the 30-day period, an application must be made, within 10 days after the giving of such notice, for his hospitalization under section 72. The same procedure must be followed, at some time before expiration of the 30-day period, even if no request for release is made, as long as the patient is still in need of further hospital care and does not agree to hospitalization as a "voluntary" or "informal" patient (Mental Hygiene Law, § 71).

Early in 1970, the State Commissioner of Mental Hygiene promulgated a regulation which shortened section 78's re-

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[2] A "mentally ill person" is defined in section 2 (subd. 8) of the Mental Hygiene Law as "any person afflicted with mental disease to such an extent that for his own welfare or the welfare of others, or of the community, he requires care and treatment".

tention period to 15 days and provided a number of other safeguards for involuntary patients (14 NYCRR 62.2; also Appendix 1, form 468a). For instance, section 62.2 of the regulations requires that a prospective section 78 patient, before being admitted to the hospital, must be "forthwith examined by a staff physician" and prompt notice of his admission given the Mental Health Information Service.[3] In addition, he must be advised that he may demand his release at any time, receive a judicial hearing as to his need for hospitalization, with counsel if desired (14 NYCRR, Appendix 1, form 468a), and, beyond that, that he must be accorded the right to habeas corpus relief (see, also, § 426).

Admission pursuant to section 72 of a person "alleged to be mentally ill and suitable for care and treatment"—and this, of course, includes an individual transferred from section 78 status—may, as indicated above (p. 394, n. 1), only be had on the certificate of two examining physicians accompanied by an application, made 10 days in advance of admission, from a relative, friend or specified official (subd. 1). Upon being brought to the hospital, the patient must be "examined forthwith by a staff physician" before he is admitted (subd. 1). Within five days, written notice of such application, along with notice of his rights, must be given to the patient, to the Mental Health Information Service and to his "nearest relative * * * other than the petitioner" (subd. 2). If a hearing is requested by any of

[3] The Mental Health Information Service is an agency established in each Judicial Department of the Supreme Court, its head and staff being "appointed and * * * removable" by the Presiding Justice of the Appellate Division for each such department. It is charged with the duties, among others, of advising the patient of his rights, studying his case and providing the court with "all * * * relevant information" concerning it (Mental Hygiene Law, § 88).

these parties, the court must schedule one within five days of receipt of the request (subd. 3) and, if none is requested within 60 days, the patient's retention beyond that time must have court sanction (§ 73). In either case, retention is authorized for no more than six months without further judicial review and, thereafter, only pursuant to continued periodic review (§ 72, subd. 3; § 73). If dissatisfied with a court order for retention or transfer, a patient or someone acting on his behalf may obtain a "rehearing and a review of the proceedings already had and of such order," with a trial, by jury if desired, on the question of the patient's mental illness (§ 74).

In July of 1969, about a year before the present proceeding was brought, Fhagen commenced a suit in the District Court for the Southern District of New York—in which plaintiff Winters later moved to intervene—raising essentially the same constitutional objections to the Mental Hygiene Law as are here advanced. Judge Weinfeld, who heard the matter, held that substantial constitutional issues were posed and ordered the convening of a three-judge court to entertain the action. (See Fhagen v. Miller, D.C., 306 F.Supp. 634.) That tribunal, in April, 1970, decided to retain jurisdiction but to abstain from passing upon the questions presented until our State courts had an opportunity to consider the challenged provisions of the Mental Hygiene Law (312 F.Supp. 323).

Two months later, the plaintiffs instituted the present action in which, as noted above, they seek a declaration that sections 72 and 78 are unconstitutional. They subsequently moved for summary judgment, and the defendants countered with a cross motion to dismiss the complaint. Among their other contentions, the plaintiffs urged that,

in order to meet due process requirements, a person may be confined under section 78 only if the term, "in need of immediate observation, care or treatment for mental illness", were to be construed as "dangerously mentally ill".[4] The court at Special Term, 65 Misc.2d 163, 317 N.Y.S.2d 128, rejected the plaintiffs' arguments, decided that the challenged provisions were constitutional and dismissed the complaint. The Appellate Division, 36 A.D.2d 926, 321 N.Y.S.2d 61, although it concurred in Special Term's conclusion of constitutionality, modified the judgment to the extent of striking from it the paragraph dismissing the complaint and substituting in its place a provision declaring the sections in question valid. We agree with that disposition.

Due process does, ordinarily, demand reasonable notice and an opportunity to be heard *in advance* of confinement or restraint. However, as we declared in Matter of Coates, 9 N.Y.2d 242, 249, 213 N.Y.S.2d 74, 79, 173 N.E.2d 797, 801), "where immediate action is necessary for the protection of society and for the welfare of the allegedly mentally ill person, [it] does not require notice or hearing as a condition precedent to valid *temporary* confinement." (Emphasis supplied.) In other words, due process does not guarantee " 'any particular form or method of * * * procedure' "; a mental patient so confined, we went on to say in *Coates*, is not unconstitutionally deprived of his liberty so long as he is afforded an opportunity within a reasonably short period "to litigate fully the question of [his] mental illness and the propriety of the proceedings which led to [his] confinement". (Matter of Coates, 9 N.Y.2d, at p. 249, 213 N.Y.S.2d, at p. 79, 173 N.E.2d, at p. 801.)

[4] Admission procedures for "dangerous mentally ill" persons are expressly dealt with in sections 76 and 85 of the Mental Hygiene Law.

Although Matter of Coates is primarily concerned with "continued" confinement, it points the conclusion here. One "afflicted with mental disease", as defined in our statute (Mental Hygiene Law § 2, subd. 8), need not be violent or dangerous to justify a short confinement prior to notice and an opportunity to be heard. The public is entitled to prompt protection against the acts of such a person which, *though not dangerous*, might, if committed by a sane person, constitute a punishable offense or which, by reason of his urgent need for immediate care and treatment, might harm others, albeit in a nonviolent manner. The "protection of society"—which we declared in *Coates* authorizes "immediate action" in the case of one allegedly mentally ill (9 N.Y.2d, at p. 249, 213 N.Y.S.2d at p. 79, 173 N.E.2d at p. 801)—requires more than the mere prevention of serious crimes of violence; it reasonably, and necessarily, includes the preservation of public order and public health. As Justice Bloustein stated at Special Term, "if the allegedly mentally ill person is engaging in conduct which, if committed by a sane person, would constitute disorderly conduct, criminal nuisance, public lewdness, or sexual abuse of a minor, the State's legitimate interest in protecting society would warrant that person's temporary confinement as surely as if the individual was engaging in conduct amounting to felonious assault or homicide" (65 Misc.2d 163, 170, 317 N.Y.S.2d 128, 136).

Moreover, since due process is not a concept to be rigidly applied, it is not offended if notice and a hearing follow confinement of a mental patient in an urgent case, as long as he is given the opportunity, within a short time, to litigate the question of his mental illness. That opportunity is amply afforded by the statutes under attack. In the

first place, a section 78 patient, under the new departmental regulations (14 NYCRR 62.2), may not be admitted to a hospital until he has been examined by a staff physician. Upon admission, he must be immediately notified of his rights, including his right to a judicial hearing as to the need for hospitalization. Further, his demand for release is to be treated as a request for habeas corpus relief, and the appropriate court and the Mental Health Information Service are to be immediately notified. He may not be retained as a section 78 patient for more than 15 days; if he is unwilling to remain on a voluntary basis, he must either be released or transferred to a section 72 status with all the protections afforded by that statute. And, moreover, the Mental Health Information Service is charged with the duty of reviewing his admission and retention and of advising him, as well as others interested in his welfare, of his right to have a judicial hearing, with counsel, and to seek independent medical opinion (§ 78, subd. 2; § 88). In view of this "protective shield of checks and balances" (Matter of Buttonow, 23 N.Y.2d 385, 390, 297 N.Y.S.2d 97, 101, 244 N.E.2d 677, 680), we find unpersuasive the plaintiffs' contention that the absence of a provision for either a preadmission, or an automatic post-admission, judicial hearing renders section 78 unconstitutional.[5]

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[5] This conclusion, we note, accords with the findings and recommendations contained in the report made by the Special Committee to Study Commitment Procedures of the Association of the Bar of the City of New York (Mental Illness and Due Process—Report and Recommendations on Admission to Mental Hospitals under New York Law [1962], pp. 7, 9, 19-28) which led to the changes in the Mental Hygiene Law (L. 1964, ch. 738). It was the committee's position that decision as to the need for hospitalization for mental illness should, in the first instance, be a medical one and that a patient's due process rights, particularly with the

Even less persuasive is the plaintiffs' challenge to the constitutionality of section 72. As indicated above, prior to his transfer to a hospital pursuant to that statute, a section 78 patient has already had notice and an opportunity for a hearing as to his need of hospitalization for mental illness as well as a right to habeas corpus relief. Then, following his transfer, he is again accorded these same rights. Moreover, he may only be admitted to a hospital under section 72 if he is found by three physicians to be "afflicted with mental disease to such an extent that for his own welfare or the welfare of others, or of the community, he requires care and treatment" (§ 2, subd. 8). And, finally, his retention as a section 72 patient beyond 60 days is subject to periodic court review and—simply upon request of the patient or of a friend or relative—a court hearing and review of an order of retention may be had, including a trial by jury, if demanded, on the question of his mental illness (§§ 73, 74). A mentally ill person, so committed and hospitalized, certainly may not be said to have been deprived of his liberty without due process of law.

We have examined the plaintiffs' other arguments and find them without substance.

The order appealed from should be affirmed, without costs.

Burke, Scileppi, Bergan, Breitel, Jasen and Gibson, JJ., concur.

Order affirmed.

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assistance of an agency such as the Mental Health Information Service, would be amply protected by immediate post-admission notice and opportunity for a hearing. (See, also, Broderick, Involuntary Hospitalization for Mental Illness, 20 Catholic U.L. Rev. 547, 620.)

Statutes Involved

Sections 78 and 72 of the New York Mental Hygiene Law, Vo. 34A McKinney's Consolidated Laws of New York Annotated, provides in pertinent part as follows:

Section 78 ("lay" commitment):

1. The director of any hospital (other than a licensed private institution) maintaining adequate staff and facilities for the observation, examination, care and treatment of persons alleged to be mentally ill and approved by the commissioner to receive and retain patients pursuant to this section may receive or retain therein as a patient for a period of thirty days any person alleged to be in need of immediate observation, care or treatment for mental illness.

2. If at any time after such admission a patient, or any person on the patient's behalf, gives notice in writing of the patient's desire to be released, or if prior to the expiration of such thirty-day period the director determines that the patient requires care and treatment in a hospital beyond such period and such patient does not agree to remain in such hospital or apply for admission to another hospital as a voluntary patient or an informal patient, an application for hospitalization made as provided in section seventy-two of this article, accompanied by the certificate or certificates of two examining physicians supporting the application, shall be filed with a hospital. Such application shall be filed within ten days after the giving of such notice and, when no such notice has been given, on or before the expiration of

such thirty-day period. Upon the filing of such application, the admission and retention of any such patient shall be subject to all of the provisions for notice, hearing, review and judicial approval of retention or transfer and continued retention, as provided in sections seventy-two, seventy-three and seventy-four of this article, provided that for the purposes of such provisions the date of admission of the patient shall be deemed to be the date on which such application is filed or the date on which said thirty-day period terminates, whichever occurs earlier. The notice of such application given pursuant to subdivision two of section seventy-two of this article shall include a statement that the patient may be subject to transfer to a state hospital or other hospital, as provided in subdivision five of this section.

3. Any peace officer of the state or of a county, town, village and city maintaining a police department organized pursuant to the laws of this state may take into custody any person who appears to be mentally ill and is conducting himself in a manner which in a sane person would be disorderly, and may direct his removal or remove him to any hospital specified in subdivision one of this section or temporarily detain any such person in another safe and comfortable place pending his examination or admission to any such hospital.

Section 72 ("medical" commitment):

1. The director of a hospital may receive and retain therein as a patient any person alleged to be mentally ill and suitable for care and treatment upon

certificate or certificates of two examining physicians accompanied by an application for the admission of such person executed within ten days prior to such admission by any person with whom the person alleged to be mentally ill may reside or at whose house he may be, or the father or mother, husband or wife, brother or sister, or the child of any such person, or the nearest relative or friend available, or the committee of such person, or an officer of any well recognized charitable institution or agency or home, or any social service officer of the town, any town or community service officer or commissioner of social services, or director of community mental health services, of the city or county in which any such person may be, or in the case of the admission of any such person to a hospital operated by the state or a political subdivision thereof, by the director of such hospital or by the director or head of any other hospital where such person may be, or the director or person in charge of a facility provided in-patient care to certified narcotic addicts assigned or transferred thereto by the narcotic addiction control commission. Such application shall contain a statement of the facts upon which the allegation of mental illness and need for care and treatment are based, and shall be executed under penalty of perjury but shall not require the signature of a notary public thereon. The director of the hospital where such person is brought shall cause such person to be examined forthwith by a staff physician of such hospital other than the original examining physicians whose certificate or certificates accompanied the application, and if such person is found to be in need of care and treatment he may be

admitted thereto as a patient as herein provided. Such original examining physician may be the director or staff member of a hospital operated or maintained by the state or a political subdivision thereof to which it is proposed to admit such person, provided, however, that in case of admission of such person to a hospital operated by the state only one such examining physician may be on the staff thereof, and in the case of admission of such person to a hospital operated or maintained by a political subdivision of the state both such examining physicians may be on the staff thereof and in the case of admission of such person to a licensed private institution, neither such examining physician may be on the staff thereof.

2. The director shall cause written notice of such application to be given the person alleged to be mentally ill not later than five days, excluding Sunday and holidays, after such admission and such notice shall set forth such person's rights under the provisions of this section. At the same time such notice shall also be given to the mental health information service and personally or by mail to the nearest relative of the person alleged to be mentally ill other than the petitioner if there be any such person known to the director, and to as many as three additional persons if designated in writing by the person alleged to be mentally ill to receive such notice.

3. If at any time prior to the expiration of sixty days from the date of admission of such patient, he or any relative or friend or the mental health information service gives notice in writing of request for hearing on the question of need for hospitalization to

the director, a hearing shall be held as herein provided. The patient or person requesting a hearing on behalf of the patient may designate the county where the hearing shall be held, which shall be either in the county where the hospital is located, the county of the patient's residence or the county in which the hospital to which the patient was first admitted is located and such hearing shall be held in the county so designated, subject to application by any interested party, including the director, for change of venue to any county because of the convenience of parties or witnesses or the condition of the patient. It shall be the duty of the director upon receiving notice of such request for hearing to forward forthwith a copy of such notice with a record of the patient as defined and described in section twenty of this chapter to a court of record in the county designated by the applicant, if one be designated, or if no designation be made, then to a court of record in the county where such hospital is located. A copy of such notice and record shall also be given the mental health information service. The court which receives such notice shall fix the date of such hearing at a time not later than five days from the date such notice is received by the court and cause the patient or other person requesting the hearing, the director, the mental health information service and such other persons as the court may determine to be advised of such date. Upon such date, or upon such other date to which the proceeding may be adjourned, the court shall hear testimony and examine the person alleged to be mentally ill, if it be deemed advisable in or out of court, and shall render a decision in writing as to the mental illness and

the need for retention of the patient. If it be determined that the patient is mentally ill and in need of retention for care and treatment, the court shall forthwith issue an order authorizing the retention of such patient for care and treatment in the hospital for a period not to exceed six months from the date of the order or if the patient is in a psychiatric hospital maintained by a political subdivision of the state or in a general hospital the court may order the patient transferred to the jurisdiction of the department for retention in a hospital operated by the state designated by the commissioner or to a licensed private institution for retention therein for a period not to exceed six months from the date of such order. If, however, it appears that such mentally ill person is harmless and his relatives or a committee of his person are willing and able properly to care for him, at some place other than a hospital, then, upon their written consent, the court may order the transfer of the patient to the care and custody of such relatives or such committee. If the court cannot hear the application it may appoint a referee to hear and report forthwith the testimony with his opinion thereon, to the court, which if satisfied with such report shall issue its order in accordance with this subdivision.